91-625



No.

# In the Supreme Court of the United States

OCTOBER TERM, 1991

E-V Company, a Partnership Composed of
Emil F. Kehr and Vincent E. Malone, and
Keller Office Equipment Company,
*Petitioners,*

v.

Urban Redevelopment Authority of Pittsburgh,
*Respondent.*

## Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

## Petition For A Writ Of Certiorari

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## THE QUESTION PRESENTED FOR REVIEW

Is a redevelopment taking of property void for lack of a due process hearing at a meaningful time and in a meaningful manner on the question of the validity of the prerequisite determination of blight when the condemnation occurred in 1981, the certifications of blight were 17 and 10 years earlier (without notice and an opportunity to be heard), no records of significance and no witnesses with a recollection of the earlier conditions were available, where massive changes took place in the area and where the condemnor had abandoned the project for six years?

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CONSTITUTIONAL AND STATUTORY PROVISIONS:

## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The Opinion of the trial court of February 21, 1986 is not officially reported. It is printed beginning at page A-56 of the Appendix to this petition.

The Opinion of the Commonwealth Court of Pennsylvania of July 8, 1988, appears in 117 Pa. Cmwlth. Ct. 475 and 544 A.2d 87, and is printed beginning at page A-44 of the Appendix to this petition.

The Opinions issued by the Supreme Court of Pennsylvania on July 12, 1991 have not yet been published. They will appear at Pa. and A.2d and are printed beginning at page A-1 of the Appendix to this petition.

## STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 12, 1991.

Jurisdiction is conferred upon the United States Supreme Court to review the judgment of the Supreme Court of Pennsylvania in question by writ of certiorari by the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1257(a).

## CITATIONS TO CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution amendment XIV, §1.

Sections 402(a) and 406 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. 1-402(a) and 1-406.

Parts of Sections 2, 3, 9 and 10 of the Pennnsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1702, 1703, 1709 and 1710.

See Appendix for texts.

## STATEMENT OF THE CASE

(References in this petition to the Reproduced Record in the Supreme Court of Pennsylvania are made by R., followed by a page number.)

*Preservation of Question Sought to be Reviewed*

Under Pennsylvania redevelopment taking procedures, a condemnor, in this case the Urban Redevelopment Authority of Pittsburgh, effects a taking of property by filing a declaration of taking with the prothonotary of the Court of Common Pleas of the county in which the property to be appropriated is located. Title passes to the condemnor when a declaration of taking is filed.

Service is required to be made upon the property owner and any tenants within 30 days of the filing of the declaration of taking. An owner or tenant thereafter has 30 days in which to file preliminary objections challenging the power or right of the condemnor to take the property or challenging the procedures and form followed and the security filed with the declaration of taking. If preliminary objections which have the effect of finally terminating the condemnation are sustained, title is to be revested in the condemnees. Sections 402(a) and 406, Eminent Domain Code of Pennsylvania, Act of June 22, 1964, P.L. 84, as amended, 26 P.S. 1-402(a) and 1-406. See Constitutional and Statutory Provisions, A-95.

Upon being served with copies of the declaration of taking filed by Urban Redevelopment Authority of Pittsburgh in this case, petitioners-condemnees filed preliminary objections raising, inter alia, the defense that the taking was constitutionally void because they had not been afforded a meaningful hearing at a meaningful time to contest the determinations of blight by the Planning Commission of the City of Pittsburgh, a finding required to be made to authorize the exercise by the Redevelopment Authority of its power of eminent domain.

The preliminary objections of E-V Company are set forth in the Appendix beginning at page A-74. Preliminary Objections Nos. 11, 12, 14, 15, 17, 21-27 and 35 raise the issue requested to be reviewed by your Honorable Court.

The preliminary objections of Keller Office Equipment Company are printed beginning at page A-86 of the Appendix to this petition. The particular preliminary objection of Keller Office Equipment Company raising the issue sought to be reviewed by your Honorable Court is No. 4.

Petitioners presented to the trial court requests for findings of fact and requests for conclusions of law which included requests for a determination that the petitioners were denied a meaningful hearing at a meaningful time. Their requests appear at R. 62a through 141a. See particularly, as to preservation of the question for review, requested conclusions of law Nos. 3-9, 13, 15, 17-20, 29 and 37-39. The requests of petitioners to the trial court for conclusions of law are printed in the Appendix beginning at page A-89.

Part I of petitioners' brief and argument to the Commonwealth Court of Pennsylvania complained of the denial of the right to a meaningful hearing at a meaningful time. The Opinion of the Commonwealth Court of Pennsylvania evidences the consideration and denial of petitioners' arguments. Appendix beginning at page A-44.

The brief and argument of petitioners in the Supreme Court of Pennsylvania in Part I set forth their grievance that they had been denied due process of law and both the majority and the two dissenting opinions in the Supreme Court of Pennsylvania evidence the consideration by that court of the points raised by the petitioners. See Majority Opinion of the Supreme Court of Pennsylvania beginning at Appendix page A-1 and the two dissenting opinions of the Supreme Court of Pennsylvania beginning at pages A-15 and A-40.

*The Procedural History*

Urban Redevelopment Authority of Pittsburgh filed a declaration of taking (R. 4a) on October 9, 1981 in the Court of

Common Pleas of Allegheny County, Pennsylvania, appropriating the property of the petitioners which, at that time, consisted of an eight story building located on Isabella Street on the North Side of the City of Pittsburgh used for the retail sale of office supplies, office furniture and furnishings and the operation of a print shop and for a record storage business.

Vincent Malone and Emil Kehr, the principals of the petitioners, had purchased the Keller Office Equipment business located on Isabella Street in September of 1973 (R. 699a-701a, 715a) and then later purchased the land and the buildings in which the business was operated in June of 1977 (R. 700a).

As previously noted, under Pennsylvania law, a redevelopment authority can only initiate a project and thereafter use its power of eminent domain to acquire property for public use after a local planning commission has determined that the area in which the project is proposed is a blighted area within the meaning of the Urban Redevelopment Law. The resolution of the planning commission determining the existence of blight is certified to the redevelopment authority and to other public officials.

In this case, there were two certification of blight determinations by the Planning Commission of the City of Pittsburgh of the area which included the property later to be acquired by the petitioners. One was by a resolution adopted on December 18, 1964, certifying 202 acres as blighted (R. 154a, 158a, 356a, 1735a); the second was by a resolution which re-certified part of the 1964 area, including what was to become petitioners' property, and which added an additional area of 27 acres. That second resolution determining the existence of blight was adopted on October 7, 1971. R. 160a-162a, 1737a.

The declaration of taking filed by the Redevelopment Authority against E-V Company, the building owner, was filed on October 9, 1981 and thereafter was served upon the owners. A "re-instated" declaration of taking was thereafter served on Keller Office Equipment Company, the tenant of E-V Company. Each of the petitioners, E-V Company and Keller Office Equipment Company, timely filed preliminary objections

which are printed beginning at pages A-74 and A-86 in the Appendix.

Discovery processes were utilized and when the preliminary objections of the petitioners came on for trial, the case was ordered to be tried by depositions. Nineteen depositions were taken from September 24, 1982 to February 28, 1983. Numerous documents were offered by both sides, some of which were admitted into evidence without objection and some of which were admitted, refused or limited after consultation upon a recess of the deposition with a member of the trial court. Some of them were never ruled upon by any member of the trial court.

Requests for Findings of Fact and Conclusions of Law were submitted by each party to Judge Maurice Louik of the Court of Common Pleas of Allegheny County to whom the case was submitted for decision after the completion of the taking of depositions. Judge Louik filed an Adjudication and Order on February 26, 1986. Appendix page A-56. The Order of Judge Louik denied the preliminary objections of the petitioners.

The petitioners filed a Notice of Appeal to the Commonwealth Court of Pennsylvania at No. 821 C.D. 1986 which considered briefs, heard oral argument and filed an Opinion and Order on July 8, 1988 affirming the ruling of the trial court. Appendix page A-44.

Petitioners then asked the Supreme Court of Pennsylvania at No. 433 W.D. Allocatur Docket, 1988 for the allowance of an appeal which was granted on May 9, 1989 limited to the issues of whether the petitioners have been unconstitutionally denied a meaningful hearing at a meaningful time to challenge the certification of blight and whether the condemnation was invalid for failure to comply with the requirements of Pennsylvania's Local Agency Law (551 Pa. 539, 558 A.2d 529). After considering briefs and oral argument, the Supreme Court, on July 12, 1991 at No. 45 W.D. Appeal Docket 1989, affirmed by a 4-3 vote the decision of the Commonwealth Court of Pennsylvania. The majority opinion was written by Justice Zappala (Appendix beginning at page A-1); a dissenting opinion was

written by Justice Larsen (Appendix beginning at page A-15) and another dissenting opinion was written by Justice Flaherty (beginning at Appendix page A-40). Justice Papadakos joined in both the dissenting opinions of Justice Larsen and of Justice Flaherty.

This petition follows.

*Facts*

No notice was required by statute and no notice was given to anyone by the Planning Commission of the City of Pittsburgh that it would consider at its meeting of December 18, 1964, the question of certifying as a blighted area the area in which the property later to be occupied and purchased by the petitioners was located. R. 146a, 147a, 166a, 167a, 684a, 685a.

No hearing was conducted in 1964 on the question of whether or not the area should be determined to be a blighted area. R. 166a, 167a; Admission of Authority in paragraph 23 of its Answer to Preliminary Objections to Declaration of Taking, R. 1683a. Nor was there notice or a hearing with respect to the consideration in 1971 of recertifying part of the area previously certified as blighted and of certifying as blighted an additional area. R. 166a, 167a, 307a, 308a; Admission of Authority, R. 1683a.

No property owners or tenants or owners or operators of businesses were notified of either meeting or were present at either meeting although the City Planning Department had the means to know from official records who such people were and their addresses. R. 905a, 914a, 915a, 1373a-1375a.

At each of the 1964 and 1971 meetings, a finding of blight was made by the Planning Commission of the City of Pittsburgh and the area including the property later to be acquired by the petitioners, was certified to the Redevelopment Authority as a blighted area for redevelopment. R. 154a, 158a, 356a, 1735a; 160a-162a, 1737a.

When Malone and Kehr bought the Keller Office Equipment Company business in 1973, neither of them knew that the

area in which the business was located had been certified as a blighted area. Nor did the seller of the business to them know of any certification of blight. R. 711a, 712a. He had operated his business there for eight years. R. 699a-701a and 715a.

Nor later, when Malone and Kehr, under the name E-V Company, bought the land and buildings of Keller Office Equipment Company, were the purchasers aware that the area had been previously certified as a blighted area. A title search of the property made in the course of purchasing it by E-V Company had failed to disclose any indication of a certification of blight. R. 700a, 704a, 705a.

After acquiring the property, E-V Company prepared and submitted to the City Planning Commission and other officials a subdivision plan for the property which had included several buildings in addition to the eight story building which is the subject of this case. The City Planning Commission approved the E-V Company subdivision plan, as did other officials, and the subdivision plan was recorded.

Thereafter, in March of 1980 and in February of 1981, E-V Company sold two of the buildings comprising its holdings. Each of the purchasers had a title examination done. Neither title examination turned up the certification of blight proceedings. R. 703a, 704a, 715a-717a. Nor when E-V Company sold the properties was there ever an indication from either the City or the Authority that E-V Company could not sell its properties. R. 717a.

In March or April of 1980, E-V Company substantially renovated its eight story building. A building permit for electrical work was obtained from the City of Pittsburgh as part of the renovation work with no difficulty encountered in obtaining the permit. R. 727a, 728a.

In 1972, a neighboring property owner on Isabella Street had bought additional land and in November of 1975, to construct a building on it, he sought approval from the City of Pittsburgh Zoning Board of Adjustment for a variance to utilize the entire lot for the building. The variance was granted without

difficulty and without any reference at all to the area having been certified as a blighted area. For that same construction, building, electrical and occupancy permits were issued by the City of Pittsburgh. $100,000.00 was expended by the neighbor for the renovations. R. 908a-913a, 915a-916a and 948a.

By trial deposition, the petitioners proved through a title examiner of an established title insurance company in Pittsburgh that he had searched the title records of the petitioners property and of an adjoining property back to the year 1950 and found no reference to the area in which the property was located as having been certified as a blighted area. R. 189a-191a and 197a.

No action had been taken by Urban Redevelopment Authority of Pittsburgh following the 1964 certification of blight until the years 1970 and 1971 at which time a Basic Conditions Report was prepared by the Planning Department of the city as a prelude to recertifying part of the original area as blighted and certifying an additional area as blighted. R. 1304a, 1302a, 1312a.

The planners, including Mr. Waddell who prepared the September 1971 Basic Conditions Report, considered that there was a need for an update of the study made prior to the 1964 certification because of the lapse of seven years since that study. The information in it was considered to be "outdated." R. 1365a, 1366a. Waddell considered the outdated 1964 data inadequate and felt it was significant to get more recent information on the question of recertifying the area previously certified in 1964. R. 1365a-1368a.

After the October, 1971 certification and the approval of a Redevelopment Proposal and Plan, some properties in the area were acquired during the early 1970s by the Authority until on June 1, 1973 the Authority curtailed the project, filed declarations of relinquishment as to 11 acquired properties revesting title in the persons whose properties had been condemned, revoked offers to purchase and requested transfer of the federal funds for the project to another project in another part of the

City of Pittsburgh. R. 1741a, 1742a, 346a, 1740a, 541a-545a, 1743a-1745a.

In 1974 or 1975 the funding for the project was shifted to other projects located in other parts of the City of Pittsburgh. R. 539a.

During the 17 years from 1964 through 1981, numerous other activities were taking place in what had been designated by the Redevelopment Authority as the North Shore Project area. There were 81 private conveyances of 70 properties (some more times than one) out of 200 or less properties in the area. These were conveyances from private persons or entities to other private persons or entities. The number does not include any conveyances to governmental agencies. R. 1037a, 1038a, 1746a, 1748a-1752a.

At least 26 new businesses had moved into the area since the certifications, the overwhelming majority of them within the last six or seven years prior to the trial of the case and after 1973. They were all located within a block or two of the subject property. R. 991a, 993a, 918a, 919a, 1747a.

No store room or office space in the vicinity remained empty during the period for as much as three months. R. 848a.

Twenty-three building permits were issued by the city in the project area during the period from 1978 (when records were available without having to go back into the city's archives) until the date of condemnation. R. 1049a, 1050a.

An unknown but large number of properties were acquired and buildings demolished by the Department of Transportation of the Commonwealth of Pennsylvania in this particular area in the years 1972 and 1973, and later, for the construction of two limited access highways and their connecting roads. R. 428a, 429a. There were a lot of buildings gone. R. 1348a-1352a.

There were other community developments and activities during the 1960s and 1970s which affected the area in which petitioners' property is located. Those activities included the development of Allegheny Center in the early 1960s, the construction of the Allegheny County Community College, the

opening nearby of Three Rivers Stadium in July, 1970, and the expansion of Allegheny General Hospital. R. 1050a, 1051a.

Renovations of buildings had been extensive during the period between the blight certifications and the condemnation of 1981. There had been renovations in at least 9 nearby buildings. R. 761a, 762a, 764a, 766a, 767a, 177a-179a.

None of these activities and none of the sales were followed or monitored by the Redevelopment Authority or the City Planning Department or the City Planning Commission. Nor was there any mechanism by which the Planning Commission or the Planning Department of the city, which served as the staff of the Planning Commission, obtained any information as to private transfers. The Authority did not attempt to stop or prohibit private property transfers. R. 394a, 397a, 462a, 456a.

Personnel of the Redevelopment Authority did not consider it necessary for the Authority to follow or be involved in activities and transactions taking place in the project area, even over a period of time. The Chairman of Urban Redevelopment Authority of Pittsburgh and the planner in charge of the project believed that any property within the area certified as blighted could be acquired by the Authority at any time without there being any specific time limit, notwithstanding the private transfers of title and other activities which had taken place within the area since the certification or recertification of blight. R. 483a, 484a, 463a, 469a, 1141a, 1142a, 1157a-1163a, 1177a, 1178a.

In 1979, the Redevelopment Authority contacted Mellon-Stuart Company, a general contracting firm in Pittsburgh, and initiated discussions about Mellon-Stuart becoming a developer of properties on Isabella Street, including the land area where the petitioners' property was located. Mellon Stuart had a very real intent in relocating a headquarters building to the North Side of Pittsburgh. R. 1135a, 1136a.

Mellon-Stuart Company and the Urban Redevelopment Authority entered into an agreement (R. 1170a, 1171a) and the City Planning Commission and the Redevelopment Authority

and the city thereafter adopted resolutions, without any notice to property owners or tenants or business owners or operators, including petitioners, modifying the 1971 Redevelopment Proposal and Plan to authorize the taking of properties on Isabella Street, including the property of the petitioners. R. 553a-556a, 338a, 339a, 587a.

No "updating" of information relating to conditions within the certified area which might pertain to the existence or not of blight in 1981 was initiated or undertaken by the Planning Department of the City or by the City Planning Commission or by the Redevelopment Authority.

In one of the first trial depositions in this case, Malcolm Strachan, a city planner with a graduate degree in that field and with extensive experience in the planning aspects of redevelopment work, described the process by which a determination is made by a planning department and a planning commission of whether or not an area under consideration is "blighted" within the meaning of the Urban Redevelopment Law of Pennsylvania.

After describing the process, Mr. Strachan—who had inspected the site—testified that as of 1982 or 1981, the year of condemnation, he could not reconstruct, as a planner, the project area as it had existed in 1964 and 1971 and could not in 1981 make a study such as would be required to determine whether the area was blighted in 1964 or 1971 because of the great number of changes which had taken place in the area. R. 238a, 239a. In his words, the "record as it was in '64 and '71 is lost." R. 238a, 239a.

A real estate appraiser called by the condemnees-petitioners by way of trial deposition, who had substantial experience in redevelopment matters over the years both for and against redevelopment authorities, testified that it would have been impossible in 1981 to ascertain what properties existed in the area in 1964 or 1971 or what the uses of them were or what percentage of the properties were residential or vacant or commercial in those years. To make a definitive study would be almost impossible. R. 1088a, 1089a.

By other trial depositions, petitioners called and cross-examined witnesses in the trial court to demonstrate that the petitioners were being denied an effective opportunity to defend against the 1981 condemnation by showing that there were no documents and there were no witnesses with firsthand knowledge and adequate recollection available 17 and 10 years after the certifications of blight to be examined or cross-examined by the petitioners as to the existence or not of alleged conditions of blight in 1964 and in 1971.

In response to a subpoena duces tecum, Robert Lurcott, the then Director of the City Planning Department, testified that he and his staff had examined all the records of the Commission and of the Planning Department with regard to the 1964 and the 1971 certification of blight proceedings and had found no notes, memoranda, drafts, recordings or records other than the minutes of the two Planning Commission meetings themselves. Nor any records showing the amount of time that was spent on work or study of the area or, except for Waddell, what persons were assigned to the study. Director Lurcott, who had not been with the City Planning Department in 1964 or in 1971, had no personal knowledge respecting those certification proceedings. R. 163a-165a, 171a, 154a, 156a-158a, 161a-163a, 170a, 172a, 179a, 180a.

The secretary of the Planning Commission in 1964, Linn Washington, was called as a witness by petitioners to demonstrate lack of knowledge considered essential to petitioners for them to successfully attack the underlying blight certifications. Mr. Washington had served on the Commission for six years and had been secretary of it for three years. He testified by deposition that he had a recollection that there had been a blight certification procedure relating to the North Side during the early 1960s, but he did not have any recollection of the location of it, the acres involved, the street boundaries, the number of structures involved, the breakdown of the properties as between residential, commercial or what, or how much of the land involved was vacant. His reason for not knowing was, "I just don't recall." R. 677a-678a, 680a, 681a.

Similarly, by trial deposition, petitioners called Paul G. Sullivan who was a member of the Planning Commission in the early 1970s and had been secretary of it in 1971. Mr. Sullivan had a hazy recollection that there had been a blight certification proceeding in 1971 but he had no recollection of the details of the matter at all, including the number of blocks, the number of structures, how many properties were vacant, commercial or residential or industrial, except that there were some of each. He did not know the proportions of each and he could not recall whether any materials were presented to the Commission or what Waddell had said, although the minutes of the meeting noted that Waddell had made a presentation.

At the trial by deposition, the Authority produced William Waddell who had joined the Planning Department of the city in 1970 and who had helped prepare the Basic Conditions Report, September 1971 which was used as the basic document for the 1971 recertification and certification of blight. R. 1302a, 1304a.

It was Mr. Waddell who had determined that seven years had elapsed since the prior study of the area and that that data needed to be updated by an additional study prior to a recertification and new certification. R. 1365a-1368a.

Mr. Waddell, however, did not recall what other subjects were discussed at the October 4, 1971 meeting, was vague as to the number of properties located in the project area—he thought there might be 200 or less—was unable to state the mix of the buildings as to their uses or the number of residences, was unable to state how many of the residential properties were two-story family dwellings, and when pressed about specifics, indicated that "That's a long time ago." R. 1361a, 1362a, 1369a, 1370a, 1376a, 1377a.

Waddell knew a number of properties were demolished by the Department of Transportation but as to the number he said, "I couldn't guess. It's just too far back to give you an exact number." R. 1352a.

Another witness called by the Authority was Jan Krygowski who had been Planning Director for the Authority. Mr.

Krygowski also could not remember any details about the certification process or the condition of the area in 1971. He testified, "It was a long time ago; I don't remember." R. 1395a, 1462a, 1464a, 1465a.

At trial, the Authority attempted to introduce into evidence numerous exhibits relating to the 1971 certification of blight. Upon objection by petitioners on the ground that the persons who had prepared the exhibits and the persons who had made obvious alterations to them were not available for cross-examination, the trial court ruled that the fact of the existence of the documents could be introduced into evidence to show good faith on the part of the Authority but, with one exception, Exhibit Z, the Basic Conditions Report, September 1971, prepared in part by Waddell, the contents of the exhibits were not to go into evidence to prove the truth of anything in them. R. 1272a, 1274a.

One of those exhibits, Exhibit O, contained 322 sheets, each entitled Urban Redevelopment Authority Detailed Land Use and Exterior Survey Sheet. Each sheet contained a photograph of a building or property and a description and grading of it. There were numerous alterations on many of the sheets written in a different handwriting and by a different type of writing instrument. Neither the persons who had originally prepared the sheets in the exhibit nor any persons who had reviewed them or made alterations of them were called as witnesses on behalf of the Authority. R. 1236a. It was agreed by counsel for the condemnor that there was no evidence that the 322 sheets had ever been seen by the Planning Commission. R. 1256a, 1257a, 1259a.

A witness for the Redevelopment Authority was Kenneth Britz, a planner, who had been retained by it in June of 1979 to be in charge of the North Shore Project. R. 353a, 355a, 394a. Mr. Britz had no personal knowledge of any of the activities in 1964 or 1971. Britz had reviewed all of the files and documents of the Redevelopment Authority relating to the two certification of blight proceedings. He was not able to testify as to anything on the 322 sheets making up the Authority's Exhibit O or to any

other matter of his own knowledge regarding the blight certifications. He had not prepared any part of the papers relating to those proceedings. R. 1236a, 1260a.

Vincent Malone, one of the petitioners, who knew the area since 1951, testified that in 1964 and in 1971 the area in which the property was involved was a very viable neighborhood with a lot of business and activity and that it was not a blighted area in 1964 or 1971. He specifically rebutted—point by point—the existence of any elements of blight in the area in those years. R. 747a-753a, 782a, 784a.

## ARGUMENT

**I. A Redevelopment Taking Is Void For Lack Of Due Process Where The First Opportunity To Challenge The Correctness Of A Prerequisite Determination Of Blight Is Not Afforded Until 17 Or 10 Years After The Determination Which Was Made Without Any Notice To The Then Property Owner And Where No Records Or Record Keepers Are Available At The Time Of Trial, Where Massive Changes In Conditions In The Area Have Taken Place Over The Years And Where The Condemnor Itself Abandoned The Project For A Long Period Of Time.**

The public use which constitutionally justifies a taking of property for redevelopment purposes is the clearance of conditions of blight.

A condemnee who wishes to challenge a taking of his property for redevelopment purposes necessarily has an absolute right to question the determination that the area in which his property is located is, in fact, a blighted area. Under Pennsylvania redevelopment taking procedures, such a condemnee files preliminary objections to the declaration of taking filed by the redevelopment authority condemnor raising the appropriate issues. *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769.

Immediately post-World War II, when redevelopment laws were enacted across the nation and a substantial effort was made by cities to clear slums and blight, the normal course of a

redevelopment project was for a planning study to be made, to be followed promptly by a finding of blight, to be followed promptly by the preparation of a redevelopment proposal, to be followed promptly by acquisition, demolition and transfer of title to the cleared property to redevelopers with restrictive covenants.

Under such a scenario, a protesting property owner wishing to challenge a redevelopment taking of his property had at least the evidence appropriate to his attack, the witnesses with events fresh in their minds and the documents which would prove (or disprove) his case. He could defend against the claimed public use of the elimination of existing blight at a meaningful time and in a meaningful manner. Helpful to him or not, the evidence for the contest was available. It was fresh.

That such is not this case is as obvious as a full moon in a cloudless night sky.

The "meaningful time to be heard" constitutional mandate is so that a litigant may be able to examine and cross-examine knowledgeable fact witnesses; so that he may examine, inquire into and probe documents; so that he may have the relevant facts available to rebut or vanquish his opponent's case in chief and to develop and present his own case in chief by fresh evidence.

When the documentary evidence is not available, when knowledgeable participants are not about, and when those who are able to be located no longer remember because 17 or 10 years have passed, and when massive changes in the area have taken place, including the private transfer of 35% of the properties in the area (70 out of 200 or less), one challenging a certification of blight is absolutely frustrated—constitutionally impotent—in developing proof, and he has, therefore, been denied due process of law and no condemnation predicated upon such an antique determination can be sustained.

Particularly is this so where the redevelopment project, as in this instance, was effectively terminated by Urban Redevelopment Authority of Pittsburgh for a six year period by the

active steps on its part of filing declarations of relinquishment for properties which it had already acquired, by the revocation of offers to purchase which it had extended and by the transfer of the project funding to other projects. The responsibility for the necessary voiding of this condemnation is that of the Urban Redevelopment Authority of Pittsburgh.

Vincent Malone and Emil Kehr purchased a business on the North Side of Pittsburgh, and then, trading as E-V Company, they purchased the building and land where the business was located altogether unaware, from any source, that there had been a certification of the area in which the business and property were located in 1964 as a blighted area with a recertification of blight by the Planning Commission of the City of Pittsburgh in 1971, two years before the business was purchased and six years before the land and buildings were purchased.

The certifications of blight were made by the Planning Commission of the City of Pittsburgh pursuant to the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. 1701, et seq. Section 10 of that statute, 35 P.S. 1710, in subsection (a), authorizes an Authority to prepare a redevelopment proposal for all or any part of an area certified by the appropriate planning commission to be a redevelopment area.

Section 1703(n) of the Urban Redevelopment Law, 35 P.S. 1703(n), defines a "Redevelopment Area" as any area, whether improved or unimproved, which a planning commission may find to be blighted because of the existence of the conditions enumerated in Section 2 of the Act.

This is the implied authority for a governmental planning commission to study an area and certify it as a blighted area. Such a certification enables a redevelopment authority to exercise the power given to it by Section 1709(i) of the Act, 35 P.S. 1709(i), to acquire by eminent domain any real property, including improvements and fixtures, for the public purposes set forth in the Urban Redevelopment Law, in the manner provided in the law, except for real property located outside a redevelopment area. Absent a valid certification of blight by a

planning commission, a Pennsylvania redevelopment authority has no power of condemnation.

There is no provision in the Urban Redevelopment Law for a "due process hearing," following notice, with regard to a certification of blight determination by a planning commission.

But, of course, the constitutional guarantee of due process of law is not dependent upon there being a statutory basis. Our under-appreciated common law system of judging enables judges and justices to harken to, and declare, what fairness is and what fairness requires.

In this case there is no difficulty about what the law should be and is. The law applicable to this case is rudimentary; it is elemental.

When your Honorable Court in *Armstrong v. Manzo*, 380 U.S. 545, reaffirmed in that adoption case the fundamental requirement of due process that there be notice and an opportunity to be heard, it added, in the words of Justice Stewart, 380 U.S. at 552, the specific requirement that the opportunity to be heard " ..... is an opportunity which must be granted at a meaningful time and in a meaningful manner." On the solid rock of *Armstrong v. Manzo*, the state supreme court in this case must be reversed, the preliminary objections to the declaration of taking sustained, the 1964 and 1971 certifications of blight be declared nullities and the condemnation voided.

Both of the core rationales of *Armstrong v. Manzo* apply to this case.

One of them, of course, is the reasoning that the opportunity to be heard must be granted at a meaningful time and in a meaningful manner as a matter of simple fairness in litigation.

The other is the concept that a shift of the burden of proof imposed by a delayed hearing deprives a litigant of due process. Again in the words of Justice Stewart, 380 U.S. at 552, "Only that [voiding the proceedings below] would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been

accorded to him in the first place." These are fundamental tenets of our concept of due process of law.

The first opportunity of the condemnees in this case to a hearing on their challenge to the validity and propriety of the 17 year old and 10 year old certifications of blight (afforded to them by their having filed preliminary objections under Section 406 of the Eminent Domain Code, 26 P.S. 1-406) was so long after the events as to deprive them of an opportunity to be heard at a meaningful time and in a meaningful manner.

But the filing of preliminary objections also carried with it, as was the case in *Armstrong v. Manzo, supra,* a shifting of the burden of proof to the petitioners to overcome the presumed regularity, good faith and appropriate discretion of the Planning Commission certifications. In fact, the burden cast upon the condemnees in their preliminary objections challenge is characterized in Pennsylvania as a "heavy one." *Simco Stores v. Redevelopment Authority of the City of Philadelphia,* 455 Pa. 438, 317 A.2d 610; *Pittsburgh School District Condemnation Case,* 430 Pa. 566, 244 A.2d 42.

There would obviously be no burden of proof on property owners—at least none is implied by the language of the Urban Redevelopment Law—to show that an area under consideration for certification as a blighted area was, in fact, or in law, or both, not blighted. That is not a rule to show cause proceeding directed against property owners. Either there is no burden of proof in certification of blight proceedings or there is a burden on the planners proposing certification to the city planning commission to persuade it that there is blight as a matter of fact as the criteria of blight are defined in Section 1702(a), 35 P.S. 1702(a), of the Urban Redevelopment Law.

In either event, the burden at the time when property owners or tenants or business owners and operators ought to be able to object and be heard—at the time of certification—is not on them.

But under Pennsylvania law, as noted, once the certification has taken place and redevelopment proposals and plans

have been submitted and approved, and a declaration of taking has been filed by a redevelopment authority, there is then a heavy burden upon a property owner to overcome the condemnation, including the issues of the discretion and validity of the actions of the planning commission in its certifying process. There is a presumption running against the objectors. Under *Armstrong v. Manzo*, 380 U.S. 545, this is not allowable. The slate has not been wiped clean.

As to a "meaningful time and in a meaningful manner" generally, as opposed to the related but integral question of the shifting of the burden of proof, the ultimate facts in this case unquestionably support the claim of the condemnees that affording an opportunity for the first time 17 years after the 1964 certification of blight or 10 years after the 1971 certification of blight for them to contest the validity and the propriety of the certifications is totally, absolutely and unquestionably unconstitutional. This is not a prompt hearing. This is not a hearing at a meaningful time.

First, as to notice, it is undisputed and clear from the record that no notice was given to any property owner or tenant or business owner or operator of the Planning Commission meetings at which the certification of blight items were on the agenda. A thorough search of the records of the Planning Commission and of the Department of Planning of the City of Pittsburgh revealed no evidence, even by advertising, of notice. Nor was it considered necessary. R. 166a, 167a, 307a, 308a, 684a, 685a, 905a, 914a, 915a.

Of course, notice could easily have been given in 1964 and in 1971. The Planning Commission and the Department of City Planning had available to them official records of names and addresses R. 905a, 914a, 915a, 1373a-1375a.

Nor is there any question that there was no hearing at either certification meeting which would comply with due process of law requirements. This was admitted by the Authority in its pleadings (R. 26a, 18a, 1683a), is not disputed and is clear from the evidence produced in the case. In the words of Waddell (the Community Planner) such meetings were, " . . . not a

cross-examination time." R. 1375a. The Commission secretaries and the minutes confirm there were no hearings.

There are a number of general propositions establishing why, apart from the shifting of the burden of proof and from its unfairness to a litigant, a certification of blight challenge 17 years or 10 years afterwards is not effective, is not meaningful, is not efficacious.

The certifications can be considered as stale in the context of appropriate government action and good planning. Waddell, when he began to prepare the Basic Conditions Report, September 1971 (Exhibit Z) in 1970, recognized that the data available to him from the 1964 certification process was "outdated" so that a new study was required. R. 1365a-1368a. If seven years was stale, a fortiorari, 10 years is stale.

Estoppel is another basis. Municipalities in Pennsylvania are subject to estoppel. *Breinig v. County of Allegheny*, 332 Pa. 474, 2 A.2d 842. The curtailment by the Authority of this project (Condemnees' Exhibits 38, 39 and 40, minutes of meetings); the relinquishment of title to properties acquired for the project by the filing of declarations of relinquishment with title revested in the condemnees; the revocation of offers to purchase; and the transfer of funds out of this project to other projects in the city amounted to an abandonment of the project in 1973 so that the Authority must be estopped—in justice—from utilizing stale certifications of blight as the justification for the 1981 condemnation.

Combined with the official actions of the Authority by board resolution curtailing the project, in effect terminating it, the undisputed facts of lack of attention, lack of monitoring and total absence of controls from the curtailment actions in 1973 until 1979, a period of approximately six years, argue that the Authority may not be permitted to unilaterally start up again without there being a new study, evaluation and review affording those affected an opportunity to be aware of what was happening and a forum in which to be heard and object.

When 81 conveyances of real estate from private persons to private persons involving 70 properties take place without the knowledge of the critical personnel of the Authority over a period of years; when 23 building permits are issued without the knowledge of the Authority; when extensive renovation of properties has been done and a subdivision plan approved and 26 new businesses have come into the area and demolition of structures have occurred for highway purposes—all unknown to the Authority and not monitored by it in any way—when four title examinations on Isabella Street done for real estate closings (and two for trial) failed to show any certification of blight proceedings, the project, however auspicious or inauspicious its beginning, was and should have been, abandoned. The governmental agencies involved had no right, under our due process of law requirements, to have started it up again without a proper factual foundation; a due process approach.

All the more so because the consultant-spokesman for the Authority testified that he knew of no document limiting the time within which a redevelopment authority could condemn, or of any limitation on the power to condemn property notwithstanding private conveyances following a certification of blight. R. 469a. Even the Chairman of the Authority testified that an authority could condemn property without time limits and notwithstanding transfers between private owners. Finally—and a course of action the condemnees say should have happened here—the Chairman admitted on cross-examination that any sensible person, after a substantial period of time and after substantial change from a certification of blight, would evaluate the circumstances and renew the certification of blight. R. 1158a, 1162a, 1163a.

To have persuaded the Planning Commission in 1964 or 1971 that the area on the North Side of the city proposed to be certified as blighted was, in fact, blighted, the Planning Department personnel at that time would have to have demonstrated to the satisfaction of the Planning Commission members that there were elements of blight in the area of the type specified in Section 1702(a), Urban Redevelopment Law, 35 P.S. 1702(a).

At the time of the certification of blight proceedings those issues of fact could have been efficaciously addressed in a contest by objecting property and business owners and operators. The evidence would have been fresh and available.

Seventeen and 10 years later no successful attack could be made for at least four specific, significant and controlling reasons:

*A.*

*At the time of the hearing there were no record makers to be examined or cross-examined.*

At the hearing, the Authority wished to get into evidence as its Exhibit O, inspection reports relating to each of the properties making up the project. There were 322 undated sheets of paper which made up Exhibit O, the sheets being entitled "Urban Redevelopment Authority of Pittsburgh Detailed Land Use and Exterior Survey Sheet." One or more photographs were attached to each sheet. R. 1236a. The witness through whom the Authority proffered the sheets was Kenneth Britz who was not the person who had prepared the forms or who had taken the pictures. R. 1259a. He was not with the Authority until 1979.

These inspection reports would be the key to the proof by the Authority—or by planners before the Planning Commission—that the project area was indeed a blighted area. Individually and collectively those reports would be the "record," the image, the photographic imprint of the land uses, the condition of the structures, the street pattern and the extent of land coverage.

There were numerous other documents proffered by the Authority during Britz' direct examination in its case in chief, documents relating to studies, reports and investigations. Except for Exhibit Z, none of these exhibits offered by the Authority was admitted into evidence as to the contents of the documents.

They were admitted on the ruling by Judge McGowan (R. 1272a-1274a) for the limited purpose only of showing that they

had been prepared and were in the files of the Authority. This was to support a claim by the Authority that it acted in good faith. But no part of the contents of any of the exhibits (except Exhibit Z), in accordance with the ruling of the court, was admissible to prove the truth of anything in them.

The Authority could not get into evidence the contents of the documents which it said demonstrated its good faith. It could not get them into evidence because it did not have the record makers available to authenticate the documents! Of course not, the documents were made years and years before the condemnation. And as to many of them, including the 322 sheets making up Exhibit O, it was unknown who prepared them, who altered them and when they were prepared and altered. They were undated and unsigned.

What good is it to a property owner where the persons who produced or changed or modified the documents are not available to be examined or cross-examined as to the method of acquiring the data; the thoroughness employed; the accuracy of the data; the quantum of the data as to its sufficiency individually or taken all together to support conclusions made; the competency of the investigators; the reliability of memory; the opportunity to observe; the presence of bias or interest; and the motivation and industry of the record makers?

If so much time has passed from the time of certification to the time of hearing that the record makers cannot be produced, then the objector does not have an opportunity to be heard in a meaningful manner at a meaningful time.

*B.*

*Since at the hearing no record makers were available, then no records were available to be examined*

From the standpoint of a fair hearing, a fair opportunity to be heard, in the absence of record makers who had prepared the documents (with one exception) proffered by the Authority, there were no records to be reviewed, questioned, inquired about or overcome at the hearing. If cross-examination is not

feasible, then data and opinions as to which cross-examination is sought, are not admissible.

Director Lurcott testified that he and his staff, after a search of the records of both the Planning Commission files and the Department of Planning files, had not found any rough notes, memoranda, drafts or recordings made at any meetings of the Planning Commission relating to the certification of blight meeting in 1964 or to that in 1971 or to any other action or discussion of those plans and proceedings in the Planning Commission. R. 163a-165a.

Nor were any records found which existed at the time of trial which would show the amount of time spent by each member of the Commission or by each employee of the Department of Planning on work or study involving the review of properties on Isabella Street or of the subject property in connection with the study for the certification of blight in 1964 or relating to the study for the certification of blight in 1971; or, except for Waddell, the persons involved. R. 171a. Surely, the time spent and the identification of the workers are appropriate subjects for cross-examination.

So now we have, 10 or 17 years after the event, a judicial inquiry into the appropriateness, wisdom and validity of governmental actions which are unable to be reviewed because neither the persons having firsthand knowledge and recollection, nor the documentation upon which the governmental action was presumably based, are available for examination. In the absence of such documentation, there is not a meaningful opportunity to be heard at a meaningful time.

### *C.*
### *The witnesses associated or formerly associated with the Planning Commission or the Authority uniformly did not have sufficient recall of the certification proceedings to assist in the judicial search for the truth*

The Secretary of the Planning Commission in the early 1960s, including at the time of the certification meeting of December 18, 1964, called as a witness for the condemnees at

trial, could only recall that some time during the early 1960s there was a certification question relating to part of the North Side as a blighted area before the Planning Commission; could not recall how many acres were involved or the boundaries by streets or the number of structures or the percentage of types of structures as between residential, commercial or what; or how much of the land involved was vacant. He had no recollection of the meeting other than the bare bones of the minutes and he did not recall whether any materials were presented to the Commission members. When asked how it was that he did not know the answers to the questions, that gentleman responded, "I just don't recall." R. 678a-681a, 685a-688a.

Likewise, the Secretary of the Planning Commission at the time of the October 4, 1971 certification meeting did not know how many blocks were involved in the area certified; nor how many structures were involved; nor how much land was vacant; nor how many structures were residential or industrial or commercial or the proportions of the various types. His recollection of the certification process was very hazy and he had no recollection of the details of the matter at all. That gentleman could not state when questioned at the hearing what the then Director of the Department of Planning had stated at the meeting, nor what Mr. Waddell had said, although the minutes reflected that both had made a presentation. The former Secretary also could not recall whether any materials were presented to the Commission members or whether the question of certification had been brought up at a prior meeting. R. 299a-319a.

Jan Krygowski was produced as a witness by the Authority which claims that he had firsthand knowledge at the time of the hearing about the certification procedures since he had been Planning Director for the Authority in the mid-1970s and had worked for the Authority and for the city and other agencies prior to that time. But Mr. Krygowski, while he had a recollection of reviewing the 1964 documents, had no recollection of the documents themselves. R. 1395a, 1462a. And as to the October 4, 1971 meeting, Mr. Krygowski had no recollection of being present at the meeting, although the minutes show that he was. He could only remember the names of two members of the

Planning Commission at that time, saying, "It was a long time ago; I don't remember." R. 1395a, 1462a, 1464a, 1465a, 1737a, 1738a.

Also, although Mr. Krygowski did remember there were probably around 200 structures, maybe less, of all types in the North Shore Project Area in October of 1971, he could not remember and testify as to the number of structures which were commercial or industrial or residential; nor did he know how many businesses had moved into the project area between 1965 and 1971. R. 1467a, 1470a. In challenging a certification of blight, the objectors ought to be able to inquire specifically as to the mix of property uses.

William Waddell was also a witness for the Authority at the hearing. He was advanced by it as a witness who could answer questions pertinent to the inquiry. He had become the Community Planner for the Planning Department in 1970.

At the hearing, Waddell could not remember how many residences were in the project area in September of 1971; nor did he have a breakdown as to how many structures were two family dwellings; nor did he know how many properties had been demolished by PennDOT for highway purposes, although he did testify that there were obviously a lot of buildings gone. Mr. Waddell could not remember other subjects discussed at the October 4, 1971 meeting and gave as the reason, "That's a long time ago," He could not approximate how many structures had been acquired by PennDOT, saying, "I couldn't guess. It's just too far back to give you an exact number." R. 1348a-1352a, 1361a, 1362a, 1376a, 1377a.

Mr. Britz, the spokesman/consultant for the Authority, of course, knew nothing about the 1964 or the 1971 certifications of blight proceedings having only come on the scene as Project Director in June of 1979.

These facts speak for themselves. None of these witnesses had any information that would be of assistance in late 1982 and early 1983 (the time of the depositions) to the condemnees

in challenging the validity and propriety of the certifications of blight.

*D.*

*By the time of the taking of the depositions in late 1982 and early 1983, the evidence of the project area itself, the "record" was gone and there could not be any meaningful hearing regarding that which had been massively changed*

Obviously, to determine whether the certified area was blighted in 1964 or 1971 one must know what the area looked like at that time.

By the time of the taking of the depositions from September of 1982 to February of 1983 following the October 9, 1981 condemnation, the evidence had been destroyed. There was no opportunity to reconstruct it, mentally or physically. What is the crux of this entire case—whether the area evidenced conditions of blight in 1964 and 1971 justifying a certification of blight—had been obliterated.

It has been obliterated, been massively changed, by 81 transfers of 70 properties between the years 1964 and the date of condemnation; by 26 new businesses coming into the area; by the demolition of an unknown but large number of properties by PennDOT for highway purposes; and by the effects of significant changes in the area described in detail in the testimony.

Malcolm Strachan, city planner. testified logically that when he made his inspection of the property of the condemnees and of the area generally in 1982, or even a year earlier at the time of condemnation, it would not have been possible to prepare from the data then available, a certification of blight study as the area existed in 1971 or in 1964. In Mr. Strachan's words the "record as it was in '64 and '71 is lost, as far as I'm concerned." R. 238a, 239a.

A real estate appraiser called by the condemnees having extensive experience in the redevelopment field and on the North Side of Pittsburgh, Patrick McGrath, testified that it was virtually impossible as of the time of his testimony to make a

determination of what the uses of properties were in 1964. He could not see how anybody could go back in time and determine what the uses of properties were unless all of the property owners were interviewed. R. 1088a, 1089a.

At least one subdivision plan (for the subject property) had been issued, building permits had been issued, remodeling and renovation had been done and the Authority had curtailed, abandoned, the project.

It was not possible at the time of the hearing to say what the area looked like in 1971 or 1964. The res was not the same.

Instead of moving expeditiously on its project in 1964 or in 1971 at a time when knowledgeable witnesses and pertinent documents were identifiable and usable, the Authority abandoned the project, paid no attention to the transfers of property between private persons or to the changes and developments taking place in the area and attempted to exercise no control over the area which had earlier been subjected to its rule by the certifications of blight.

*Armstrong v. Manzo*, 380 U.S. 545, dealing with an adoption question, is, of course, not the only pronouncement of your Honorable Court relating to the timeliness of a hearing in order to meet due process of law requirements. Other cases since *Armstrong* are collected in a footnote.[1]

Compare the values involved to the test laid down by Mr. Justice Brennan, concurring in the *Barry* case, *supra*, the horse trainer's license case, where he stated, "To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—i.e., either before or immediately after suspension." 443 U.S. at 74.

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[1]*Barry v. Barchi*, 443 U.S. 55; *Bell v. Burson*, 402 U.S. 535; *Logan v. Zimmerman Brush Company*, 455 U.S. 422; *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337; *Wisconsin v. Constantineau*, 400 U.S. 433; *Fuentes v. Shevin*, 407 U.S. 67, reh den 409 U.S. 902; *Jenkins v. McKeithen*, 395 U.S. 411, reh den 396 U.S. 869; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601; and *Parratt v. Taylor*, 451 U.S. 527.

It was too late in 1981 for the condemnees to challenge the ancient certifications.

**II. The Public Importance Of The Issue Sought To Be Reviewed Is Great And Requires Quick Remedial Surgery By Your Honorable Court To Excise The Tumor Of The Pennsylvania Decision And To Prevent Its Spread To Other Parts Of The Body Politic.**

The majority decision of the Pennsylvania Supreme Court in this case—which is totally inconsistent with the principles so well established by your Honorable Court—has now given broad immunity to every borough, city and county planning agency and redevelopment authority within the Commonwealth of Pennsylvania to do very much as it pleases with the planning device of blight certification.

After all, there can hardly be a more egregious case of abuse of due process than this case.

Nor are Pennsylvania property owners, tenants, business owners or business operators the only persons with cause to be concerned by the 4-3 vote of the Supreme Court of Pennsylvania. Citizens of each state in the union whose court of last resort might find the reasoning of the majority of the Pennsylvania Supreme Court in this case persuasive are similarly endangered.

For these reasons, certiorari should be granted.

## CONCLUSION

Petitioners request that a writ of certiorari issue in this matter to the Supreme Court of Pennsylvania.

*Respectfully submitted,*

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